

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re MIA L., a Person Coming Under  
the Juvenile Court Law.

B291344  
(Los Angeles County  
Super. Ct. No. CK66307E)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ANTHONY M.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Robin R. Kesler, Juvenile Court Referee. Affirmed with directions.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristin P. Miles, Assistant County Counsel, and Veronica Randazzo, Deputy County Counsel, for Plaintiff and Respondent.

---

## INTRODUCTION

Father, Anthony M., appeals from orders denying his request to modify prior dependency orders pursuant to Welfare and Institutions Code<sup>1</sup> section 388 and terminating his parental rights to his daughter, Mia (born November 2013) under section 366.26. Father also contends the juvenile court failed to comply with the notice provisions of the Indian Child Welfare Act (ICWA). We remand for the purpose of limited ICWA compliance; otherwise we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

We state the record in the light most favorable to the juvenile court's decision, drawing all reasonable inferences from the facts in support of the court's ruling. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

### *The Prior Dependency Proceeding (Mia's Birth through 20 Months)*

Mia first came to the Department's attention because her mother tested positive for methamphetamine while pregnant.<sup>2</sup> Shortly after birth, the Department detained Mia and filed a

---

<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

<sup>2</sup> Mother is not a party to this appeal.

petition alleging she was at substantial risk. The risk arose from mother's unresolved history of drug abuse demonstrated by positive drug tests. Also, Mia's four half-siblings were dependents because of mother's drug abuse and because she allowed the children to reside in a home where drugs were being used. The petition further alleged father struck mother in the face, punched a wall and a door, and restrained mother in the presence of Mia's half-siblings. (§ 300, subd. (b).)

Father appeared at the November 21, 2013 detention hearing in custody.<sup>3</sup> The court found him to be Mia's presumed father. The court removed Mia from both parents' custody and ordered incarcerated parent services for father. At the six-month review hearing (§ 366.21, subd. (e)), the juvenile court found father was not in compliance with his case plan.

At the 12-month review hearing (§ 366.21, subd. (f)), the juvenile court terminated the suitable placement order. Mia was returned to mother's home under Department supervision. The court ordered enhancement services to father and an evaluation for proposed monitors to transport Mia to father's place of incarceration. In July 2015, the juvenile court terminated jurisdiction and Mia was released to mother.

*The Current Dependency Petition (Mia at 23 Months to Present)*

Two and a half months later, the Department filed a petition alleging mother left Mia with maternal grandmother for over a month without making an appropriate plan for the children's welfare. Mother failed to provide for Mia's care and

---

<sup>3</sup> The Department reported father had been arrested for felony drug possession in July 2013, and Mia's half-siblings had witnessed him using and selling drugs.

supervision. (§ 300, subd. (b).) Father was identified as Mia's alleged father. The Department's detention hearing report identified father as Mia's presumed father. Father was unavailable for the following hearing because he was in custody and an "In and Out Order" could not be processed in time.

At the October 7, 2015 hearing, mother completed a paternity questionnaire where she indicated father held himself out as a parent but met no other criteria. The Court found father appeared to be an alleged father, not presumed.

#### *Denial of Reunification Services for Father*

In the Department's December 2015 jurisdiction and disposition hearing report, the social worker stated she attempted to contact father in prison to inquire about his Indian heritage and anticipated release date. Despite her several attempts, she was unable to speak with him. However, she was notified father's "earliest possible release date [wa]s 8/23/18." The report found father was "unable to provide for Mia" and recommended denial of reunification services "due to length of incarceration." According to the notice and proofs of service, the Department sent notice of the December 2016 jurisdiction hearing to father at Wasco on November 12, 2015, by "certified or return receipt mail." (See § 291.)

At the continued hearing, the juvenile court sustained the section 300 petition. At the disposition hearing, the juvenile court declared Mia a dependent child and found by clear and convincing evidence there was substantial danger if she was returned to her parents' custody. Without removing Mia from her parents' custody, there were no reasonable means to protect her.

The court ordered “no reunification services” for father pursuant to “sections 361.5(a) and 361.5(e).”

Section 361.5(e) provides the court may deny services to an incarcerated parent if it determines by clear and convincing evidence that services would be detrimental to the child. Among the factors to be considered are the age of the child, the degree of parent-child bonding; and the likelihood of the parent’s discharge within the short time period provided for service to parents of a very young child per section 361.5(a). Here, father had been incarcerated since before Mia was born and they had no parent-child bond. Moreover, father would remain in prison well beyond the time period provided in subsection (a). So the denial of services was entirely appropriate.

The Department continued to send father notice of hearings and status reports by first class mail for the next 18 months. However, father made no contact with the Department.

At the contested 12-month review hearing, the court terminated mother’s reunification services. It ordered an adoption assessment for Mia and scheduled a hearing to select a permanent plan (§ 366.26). On August 29, 2017, the Department personally served notice of the section 366.26 hearing on father as Mia’s “presumed” father at Solano in Vacaville.

Counsel for father confirmed she wrote to father at Solano in Vacaville, and he responded from that address.

### *Father’s Section 388 Petition*

On May 14, 2018, father filed the section 388 petition at issue in this appeal. Father asserted the juvenile court should change two of its prior orders. First, the October 7, 2015 order finding him to be Mia’s alleged father should be changed because

he was found to be her presumed father on November 21, 2013. Second, he argued, because he was a presumed father, the May 24, 2016 disposition order denying him reunification services as an alleged father under section 361.5, subdivision (a), was factually and legally erroneous. He requested Mia's return or, alternatively reunification services. Father alleged the proposed change would be best for Mia because (1) he had the right to reunification services as her presumed father; (2) the court must address placement or reunification services to address any concerns; and (3) it is in Mia's best interest for the court to follow legal requirements so father can work towards reunification. The petition did not address the court's alternative ground for refusing reunification services—father's incarceration—and the section 361.5(e) factors discussed above.

#### *The Section 388 Hearing*

At the continued permanent plan hearing (§ 366.26), the court noted father was listed in the December 2015 jurisdiction and disposition report and was noticed in prison by certified return receipt. Father's counsel conceded "[h]e did receive notice." The basis for his petition was to correct the claimed inaccuracy of his paternity status and proceed with family reunification. Father testified he last saw Mia in court in 2013 or 2014. He acknowledged he was incarcerated for the duration of the proceedings and failed to reunify because of his incarceration in northern California. He acknowledged he had a lengthy prison

sentence and anticipated his release date would be extended because of a “write[-]up” for a positive drug test.<sup>4</sup>

Father testified he refused transport to the juvenile court for the last hearing because he was waiting to see a doctor. Because he never received a “bus ticket application,” he missed the other hearings where he could have requested services and reunification. He came to court this time and in 2014 because he received documents to sign and appear. Father testified he knew of both cases involving Mia, one in 2013 and one in 2015. For the 2015 case, he received written notice of the court date but “no document [asking] if I wanted to come or be present.” Father told the court he wanted “to build up a relationship for [Mia].” He knew Mia was in good hands and did not “plan on . . . ripping [Mia] from everything she’s known.” However, he wanted to maintain parental rights.

Father’s counsel argued there was a change of circumstances because he would be released in five months. It was clear he was found a presumed father on the prior petition. Therefore, he argued it was an error to deny reunification services on May 24, 2016 based on the October 7, 2015 alleged father finding. While he acknowledged Mia was safe with her maternal grandmother, father wanted to complete a case plan. He alleged he should have been granted the opportunity to reunify. His counsel requested “6 to 12 months” of services and stated if services had been granted in May 2016, delay would have been avoided.

---

<sup>4</sup> He contended he was prescribed Tylenol with codeine for a leg infection, but his prescription had run out the day before the drug test.

The Department noted father received reunification services in 2013. Father testified he was given notice of the 2015 petition but he did not testify he tried to call the social worker or indicate in any way he wished to participate. The Department conceded father was previously found to be a presumed father. However, the case plan was not based only on reunification services to presumed fathers under section 361.5, subdivision (a). Father was denied services based on subdivision (e), which applies to incarcerated parents (as discussed above). Therefore, any error in finding father to be an alleged father after finding him to be a presumed father was harmless.

The juvenile court took judicial notice of the original case plan, which noted father's lengthy incarceration "would exceed the time [the court] had to offer him services." The court ordered the May 24, 2016 minute order corrected nunc pro tunc to state reunification services were denied pursuant to section 361.5, subdivision (e).

The juvenile court denied father's request to change the May 24, 2016 order to grant reunification services because he demonstrated only "changing circumstances[,] not changed." Additionally, the request was not in Mia's best interests. Father was incarcerated beyond the reunification period, and the "case plan had [section] 361.5(e) checked." The court explained the case was already past the two years offered to incarcerated parents to reunify. (§ 366.250.) If the court granted reunification services, father would not be released for another five months. Thus, the court could not find Mia would be returned to his custody within six months.

### *Termination of Father's Parental Rights*

The court then turned to the section 366.26 hearing. Father's counsel asked to continue the hearing because the adoptive home study was not complete. While the adoptive home study should have been completed, Mia had been placed with her maternal grandmother for an extended period. Furthermore, her home was already approved for legal guardianship of her four siblings. Counsel for Department, Mia and mother asked to terminate parental rights and declare maternal grandmother as the prospective adoptive parent. Department counsel argued Mia was adoptable and father could not prove an exception to the termination of parental rights.

The juvenile court found Mia adoptable by clear and convincing evidence, no exceptions to adoption applied, it would be detrimental to return Mia to her parents' physical custody, and ICWA did not apply. The court terminated parental rights and declared Mia's maternal grandmother her prospective adoptive parent.

## **DISCUSSION**

### *1. Father's Section 388 Petition*

Father contends the juvenile court abused its discretion by denying his section 388 petition because he did not receive the notice due a presumed father and was denied reunification services as a result. Notwithstanding deficiencies in the statutory notice he received, we conclude any such errors were harmless.

*a. Legal Principles and Standard of Review*

The “essence” of a section 388 petition is the assertion that “new evidence or a change of circumstances exists warranting a finding that the best interests of the minor child will be served if a previous order of the court is changed, modified or set aside.” (*In re Marcos G.* (2010) 182 Cal.App.4th 369, 382.) For parents facing termination of their parental rights after reunification services have been terminated, “[s]ection 388 provides the “escape mechanism” that . . . must be built into the process to allow the court to consider new information.’ [Citation.]” (*In re Zacharia D.* (1993) 6 Cal.4th 435, 455.) Viewed in the context of the dependency scheme as a whole, section 388 provides the parent due process while accommodating the child’s right to stability and permanency. (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478.) After the termination of reunification services, section 388 allows a parent to rebut the presumption that continued out-of-home care is in the child’s best interests by demonstrating changed circumstances that would warrant modification of a prior court order. (*Ibid.*)

A section 388 motion is a proper means to raise a due process challenge based on lack of notice. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189, citing *Ansley, supra*, 185 Cal.App.3d at p. 481.)

We review the denial of a section 388 petition for an abuse of discretion. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.) The appropriate test is “whether the trial court exceeded the bounds of reason.” (*In re Stephanie M., supra*, 7 Cal.4th at pp. 318-319.)

*b. The Juvenile Court Did Not Abuse its Discretion*

In his section 388 request, father asked the juvenile court to change two orders: (1) the October 2015 determination he was Mia's alleged father despite the court's November 2013 finding he was her presumed father and (2) the May 2016 disposition order denying him reunification services, supposedly on the sole ground he was an alleged father, rather than a presumed father entitled to services under section 361.5, subdivision (a). The juvenile court agreed with father on the first point but determined (as noted above) he had been denied reunification services on the additional basis of his lengthy incarceration beyond the reunification period under section 361.5, subdivision (e).<sup>5</sup> At the time of father's section 388 hearing, he remained incarcerated with five months remaining on his sentence. The juvenile court concluded father had failed to demonstrate a change in circumstances or that Mia's best interests warranted an order for reunification services.

Father initially conceded that under section 361.5, subdivision (e)—his lengthy prison sentence rendered the denial

---

<sup>5</sup> Section 361.5, subdivision (e)(1) provides in relevant part: "If the parent . . . is incarcerated . . . , the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered . . . , the likelihood of the parent's discharge from incarceration . . . within the reunification time limitations described in subdivision (a), and any other appropriate factors. . . . Reunification services are subject to the applicable time limitations imposed in subdivision (a)."

of his presumed parent status “harmless error.” Father now contends the juvenile court abused its discretion in basing the disposition order on section 361.5, subdivision (e). Father alleges the May 24, 2016 reporter’s transcript reveals the juvenile court cited subdivision (e) and described father as “whereabouts unknown, non-custodial parent not seeking custody, and should he make himself available, his visits are monitored by any department-approved monitor.”<sup>6</sup> The contention is meritless.

Father did not submit or rely on the reporter’s transcript at the section 388 hearing. However, the juvenile court took judicial notice of father’s court-ordered case plan signed by the same bench officer. On that form, boxes were marked to indicate father was an “incarcerated parent” and would receive no family reunification services based on sections 361.5(a) and 361.5(e). Moreover, the Department had recommended the denial of reunification services for father due to the length of his incarceration. The juvenile court specifically raised the issue of notice at the start of the section 388 hearing. The court noted the proof of service indicated father received notice of the December 2015 jurisdiction hearing. But, it did not appear there had been an order for his temporary removal from prison to appear in court (Pen. Code, § 2625, subd. (d)). After reviewing the entire file and communicating with father, father’s counsel told the court father “*did* receive notice.” (Italics added.) Father also testified he had received notice. We conclude father has forfeited the issue of notice on appeal. (*In re B.G.*, *supra*, 11 Cal.3d at p. 689; see also *In re P.A.* (2007) 155 Cal.App.4th 1197, 1209 “[b]ecause defective

---

<sup>6</sup> These remarks are consistent with the Department’s April 2016 report stating that father’s address was “confidential” at that time.

notice and the consequences flowing from it may easily be corrected if promptly raised in the juvenile court [father] has forfeited the right to raise these issues on appeal”].)

Moreover, as our Supreme Court explained in *In re Jesusa V.* (2004) 32 Cal.4th 588, 624, noncompliance with Penal Code section 2625 is subject to harmless error analysis, and given father’s prison sentence extending well beyond the reunification period, “one can say with confidence that ‘[n]o other result was possible’ even if he had been present.” (*Id.* at p. 626; see also *Marcos G., supra*, 182 Cal.App.4th at p. 390.)

While a section 388 petition is a proper means to raise a due process challenge based on lack of notice (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189), a notice violation does not demonstrate prejudicial error. (See *id.* at p. 191 [“if a missing parent later surfaces, it does not automatically follow that the best interests of the child will be promoted by going back to square one and relitigating the case”].) “The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate.” (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.) “Children need stability and permanence in their lives, not protracted legal proceedings that prolong uncertainty for them. Further, the very nature of determining a child’s best interests calls for a case-by-case analysis, not a mechanical rule.” (*In re Justice P., supra*, 123 Cal.App.4th 181, 191.) Father has failed to demonstrate an abuse of discretion.

2. *Termination of Father's Parental Rights*

Father contends the order terminating his parental rights must be reversed because the juvenile court never made a finding of detriment by clear and convincing evidence. We disagree.

To the extent father asserts he was a nonoffending, non-custodial parent entitled to custody, as explained in *In re A.A.* (2012) 203 Cal.App.4th 597, “if the noncustodial status of the incarcerated parent is due to a prior dependency order removing custody, and there has been no intervening restoration of the parent’s right to physical custody of the child, the court need not inquire if that parent desires to have the child placed with him or her.” (*Id.* at pp. 608-609.) Further, the dependency court not only removed Mia from both parents’ custody by clear and convincing evidence, but in denying reunification services on the basis of father’s incarceration, the juvenile court had to determine, “by clear and convincing evidence, those services [to reunify father] would be detrimental to the child.” (§ 361.5, subd. (e).)

3. *ICWA Notice*

The department concedes the juvenile court concluded in the prior proceeding ICWA did not apply. Yet nothing in the record indicates either the department or the court conducted any ICWA inquiry. It also concedes a limited remand for ICWA compliance is appropriate.

Upon remand, if the court finds Mia to be an Indian child after providing proper notice, it shall conduct a new disposition hearing in compliance with ICWA and California law. (See *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1388-1389.) Otherwise, the prior orders shall stand.

### **DISPOSITION**

The matter is remanded to the juvenile court with directions to comply with the inquiry and notice provisions of ICWA. In all other respects, the orders are affirmed.

CURREY, J.

We concur:

MANELLA, P. J.

COLLINS, J.